Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of<br><br>Petition of Vaya Telecom, Inc. for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges | CC Docket No. 01-92 |

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA**

The California Public Utilities Commission (CPUC or California) submits these comments in response to the Public Notice released September 20, 2011.[1] In the Public Notice, the Federal Communications Commission (FCC of Commission) asks for comment on the Petition for Declaratory Ruling (Petition) filed by Vaya Telecom, Inc. (Vaya) on August 26, 2011, in which Vaya asks the FCC to declare that "a LEC's attempt to collect intrastate access charges on LEC-to_LEC VoIP traffic exchanges is an unlawful practice."

The CPUC submits limited comments on two points: 1) a glaring misstatement in Vaya's Petition, and 2) the FCC should not address any questions pertaining to intrastate, or for that matter, interstate, access charges in the context of a request for declaratory

[1] Public Notice, "Pleading Cycle Established for Comments on Vaya telecom Petition for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges", CC Docket No. 01-92, DA 11-1561, September 20, 2011.

ruling. California's comments are offered in light of numerous sets of previous comments on related issues, including intercarrier compensation and the overriding need for the FCC to address regulatory treatment of VoIP providers, which the CPUC has filed in many other dockets.

## I. VAYA MISREPRESENTS THE STATE OF THE LAW

Vaya contends that the law pertaining to IP-PSTN traffic "is well-settled". If only that were the case. In fact, the FCC has decided only part of the IP/PSTN traffic exchange story. In the FCC's *IP-Enabled Services* docket, the FCC concluded that all traffic which terminates on the PSTN must pay terminating compensation.

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, **irrespective of whether the traffic originates on the PSTN, on an IP network**, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[2]

Thus, it would appear that the FCC has decided that IP-to-PSTN traffic is not exempt from "compensation obligations."

Nonetheless, building on its erroneous assertion, Vaya then argues that it is also "well-settled – as a matter of Commission precedent and court decisions – that ISP-bound traffic is jurisdictionally interstate traffic." California does not disagree that the FCC so concluded. But Vaya then attempts to bootstrap from that FCC determination and jump to another conclusion – that "[t]he traffic exchanged between Vaya and other LECs essentially has the same characteristics but travels in the opposite direction of ISP-bound

[2] In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking, WC Docket 04-36, 2004 FCC LEXIS at ¶¶ 33, 61 (March 10, 2004) (Emphasis added).

traffic". This leap of logic fails. The FCC has made no such determination that traffic travelling from the Internet to the PSTN, which then carries that traffic to its destination and terminates the traffic at customer locations on the PSTN, has "essentially the same characteristics" as PSTN-IP traffic.[3] The absence of a Commission precedent resolving this question undercuts Vaya's claim that traffic exchanged by LECs that "implicates the Internet is jurisdictionally interstate traffic based on the Commission's end-to-end analysis." [4]

To further dispute Vaya's contention that any traffic that "implicates the Internet" is jurisdictionally interstate, the CPUC notes the FCC's conclusion that traffic which travels on the Internet at some point in its transmission, the so-called "IP-in-the-middle" traffic routing scheme, is telecommunications, and thus, not exempt from intercarrier compensation.[5] Beyond these holdings, despite repeated entreaties from many quarters, the FCC has yet to determine the regulatory status of VoIP service. Nor has the FCC made any determination that traffic which "implicates the Internet" is jurisdictionally interstate. Indeed, in many respects, the FCC has extended to VoIP service and its providers the obligations of traditional POTS providers, including mandates to contribute to the federal universal service fund, to provide E-911, to protect customer privacy, and to port telephone numbers.[6]

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[3] The CPUC also disagreed with the FCC's tentative conclusion that PSTN-IP traffic did not terminate at the telephone number of the ISP, but that is water under the regulatory bridge.
[4] Petition, p. 3.
[5] *See In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are Exempt from Access Charges*, WC Docket No. 02-361, 19 FCC Rcd 7457 (2004) (IP-in-the-Middle).
[6] This is a partial list of such obligations.

Given what the FCC has done and has not done on the question of regulatory treatment of VoIP service and providers, the state of the law is hardly "well-settled."

## II. THE FCC SHOULD RESOLVE THE QUESTION VAYA RAISES IN A RULEMAKING AND NOT IN RESPONSE TO A REQUEST FOR DECLARATORY RULING

The core issue that Vaya has raised in its Petition – whether traffic that "implicates the Internet" is, by definition, exempt from intrastate access charges – should not be resolved in the context of a request for declaratory ruling. The scope of this issue is writ large across many dockets before the FCC, and in the federal courts. Precisely because of the scope and prominence of the question, the appropriate venue for the FCC to reach a conclusion and provide some regulatory certainty is in the context of a rulemaking. For example, the Commission could address this question after taking further comment in the open docket regarding intercarrier compensation, universal service, and Carrier-of-Last-Resort obligations.[7] Alternatively, the FCC could open a new docket to specifically address this question. But, the FCC should *not* attempt to resolve this question here.

The CPUC notes a previous occasion on which the FCC looked at a VoIP issue in the context of a declaratory ruling – in the *Vonage* case.[8] There, the FCC concluded that "[t]here is, quite simply, no practical way to sever DigitalVoice into interstate and instrastate communications",[9] and accordingly the FCC pre-empted Minnesota from regulating Vonage's nomadic VoIP service. The *Vonage* decision has spawned endless

[7] *See Further Inquiry in the Universal Service –Intercarrier Compensation Transformation Proceeding* (*Further Inquiry*), WC Docket 10-90, *et al*.
[8] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, Rel: Nov. 12, 2004
[9] *Id*., at ¶ 31.

debate and contention before state commissions and in the courts. The Commission's determination was just the beginning of a long discussion, and that discussion has not been punctuated by a further clarification from the FCC.

## IV CONCLUSION

For the reasons set forth here, the CPUC urges the FCC not to grant Vaya's Petition for Declaratory Ruling, but rather, to resolve the question Vaya raises, along with other related questions raised in other contexts, in a rulemaking of the FCC's choosing.

Respectfully submitted,

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